Grunau Company, Inc. *and* Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO. Case 16-CA-7919

June 17, 1981

DECISION AND ORDER

On January 14, 1981, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in answer to Respondent's exceptions, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Grunau Company, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees who are union stewards for engaging in concerted activity for the mutual aid or protection of employees by making safety complaints or otherwise making complaints or requests to insure compliance with existing union contracts.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL offer Jimmy C. Morgan immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of pay which he may have suffered as a result of his unlawful discharge, with interest.

GRUNAU COMPANY, INC.

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Oklahoma City, Oklahoma, on November 6 and 8, 1978, and January 10 and 11, 1979. The original charge was filed by the Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (the Union) on May 26, 1978, and an amended charge was filed August 7, 1978. The complaint was issued on August 9, 1978, by the Regional Director of Region 16 of the National Labor Relations Board (the Board), on behalf of the General Counsel. The complaint alleges that the Respondent (the Company) unlawfully discharged employee (and union steward) Jimmy C. Morgan on December 19, 1977,[1] in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act).[2] The Company defends on the

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct the following inadvertent errors of the Administrative Law Judge which are insufficient to affect our decision: In referring to the dates on which the hearing was held, the Administrative Law Judge referred to November 8, 1978, rather than November 7. In fn. 19, his second reference to Foreman Fisher is clearly intended to be Union Steward Morgan. In sec. II,B, he stated that November 25, 1977, was a holiday; however, the record does not support such a finding.

[2] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Morgan, we do not adopt his characterizations that Morgan's performance as union steward "pushed at the upper limits of his duties" and fell "just short of unreasonableness." However, it is clear, as found by the Administrative Law Judge, that Morgan was an active steward and that Fisher was agitated by Morgan's performance as steward.

Respondent, relying on testimony which was specifically mentioned by the Administrative Law Judge, contends that Morgan would have been discharged in any event because of his "insolence" in allegedly telling Project Manager Morrall on the day of his discharge that his plan to take additional time off was "none of your goddam business." However, even assuming, *arguendo*, that Morgan made such a remark, it is clear that Respondent did not rely on it as a reason for discharging him. Thus, as noted by the Administrative Law Judge, Morgan's termination slip indicated that he was discharged for excessive absenteeism, and in its brief to the Administrative Law Judge Respondent stated that Morgan was discharged because "he was going to take another two weeks off."

[3] Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[1] All dates hereafter are in 1977 unless otherwise indicated.

[2] The pertinent parts of the Act provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the

Continued

ground that Morgan was discharged essentially for absenteeism and not for engaging in protected concerted activities in the performance of his job as union steward.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT[3]

I. JURISDICTION

The pleadings and admissions herein establish the following jurisdictional facts. The Respondent company is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of Wisconsin, doing business in Oklahoma City, Oklahoma, where it is engaged in the installation of automatic sprinkler systems. During the 12-month period prior to the issuance of the complaint herein, the Respondent, in the course and conduct of its business operations, purchased goods valued in excess of $50,000 directly from points located outside the State of Oklahoma. Thus, and as admitted, I find and conclude that the Company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find and conclude, as alleged and admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company is a large nationwide mechanical contractor and for many years has been a party to numerous national and local union contracts. It declines invitations to bid on nonunion jobs or projects. The Company holds the contract to install a sprinkler and fire protection system at the General Motors assembly plant being built in Oklahoma City. The plant is approximately 78 acres under one roof, and is the sole project or site involved in this case. All contractors and unions involved on the project were signatories to a project agreement, which took precedent over all other union contracts where there were inconsistancies.

The Company commenced work on the site in July with one shift and, in August, preparations were made for a second shift to commence work. At this time Union Business Agent Johnny Russell Lemmons notified Job Superintendent Frank Boyance that he was appointing Jimmy Morgan, then residing in Louisiana, as union steward for the second shift.[4] On Tuesday, August 16, Morgan reported to the site. The second shift was not due to start until the following Monday and until then Morgan was assigned to work on the existing day shift under Foreman Clarence "Tuffy" Lemons, to become familiar with the job and the men. On Friday, August 19 foreman Lemons fired Morgan but, over the weekend, Union Business Agent Lemmons interceded on Morgan's behalf and he was reinstated and commenced working as steward on the night shift Monday, August 22.[5] Morgan was again discharged or December 19, 1977, which ultimately brought about the issuance of the complaint in this case on August 9, 1978.

B. *Events Leading to the Discharge*

1. The absenteeism

The Company had no formal absentee policy at the jobsite. The project agreement stated that "chronic absentees will be discharged for absenteeism."[6] In September Morgan missed approximately a week because of a back injury and in October he missed several days because of the flu. In late October the Company wrote the Union about Morgan indicating that he had, among other things, been "reporting late for work."[7] In November, Morgan was absent with permission on Monday, November 28.[8] On December 9 Morgan called in indicating he would not be reporting because of the cold weather.[9] Over the weekend of December 10–11, Morgan decided to remarry on Monday, December 12. That morning (December 12) he called Project Manager Morrall and informed him of the sudden marriage and that he would be absent that day. With the exception of the illness ab-

rights guaranteed in Section 7. . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discharge membership in any labor organization . . . .

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[3] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The findings herein are in part based upon credibility resolutions which have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony has been reviewed and weighed in light of the *entire* record.

[4] Lemmons testified that he chose Morgan over a local employee-member so that he could be more assertive without the fear of jeopardizing his future job possibilities in the Oklahoma City area. The Union did not maintain a hiring hall.

[5] The facts are sketchy as to why Lemons fired Morgan on Friday, August 19. Lemmons testified that Morgan was not "worth a shit," but on cross-examination conceded that the fact that Morgan was from "outside the state" had a "little bit" to do with it.

[6] Regarding this clause, the project agreement did not distinguish between excused or unexcused absences. The agreement did state, however, that those absent 3 workdays without notice would be terminated as quits. The Respondent, in its brief, emphasizes this fact in urging that even excused absences counted toward concluding an "excessive" rate.

[7] Other than the specific instances recited in this Decision, and on one additional occasion conceded by Morgan in testimony, the accuracy of the "reporting late" comment is not adequately supported by the record. The basic tenure of the late October letter was not Morgan's absences but his alleged unsatisfactory attitude and performance on the job. The letter will be discussed in this light later in this Decision.

[8] The previous Thursday, November 24, was Thanksgiving Day. Morgan was listed as "absent" on Friday, November 25, which was in fact also a holiday.

[9] Foreman Fisher had announced this policy in November.

sences in September and October, Morgan was thus absent 1 day in November and 2 days in December prior to his discharge on December 19. In November, 2 other crewmembers had taken days off with permission to go hunting. On December 19, Morgan indicated he was planning to take 2 additional weeks off in December to visit his children by his first marriage in Colorado and to visit his parents in New Orleans. Project Manager Morrall voiced displeasure with this prospect, consulted with the Company's senior vice president, Bohlmann, in Milwaukee, and Morgan was discharged later in the day.[10]

2. Morgan's actions as steward

As the union steward on the job, Morgan not only performed the work of the other crewmembers, but acted as the union representative of the employees on the job regarding compliance with the union contract and project agreement, including safety and other working conditions. During his employment and as union steward, Morgan made various complaints and requests, usually either to Foreman Fisher or Project Manager Morrall, who was also in charge of safety. These complaints included the use of worn safety strap, insufficient numbers of goggles, men riding on equipment, the lack of a coffee break, and the reporting to work of employees "by the foreman's watch."[11] All of Morgan's complaints were favorably acted upon by the Company, and in the case of the coffee break, without obligation.

3. The conflicts between Morgan and Foreman Fisher[12]

Fisher and Morgan did not get along with each other from the beginning. Early on, Morgan and Fisher, who was upset at the time, came to Project Manager Morrall, Fisher stating that one or the other would have to leave. In early November and in front of other employees, Fisher threatened to "stick [Morgan's] head in the mud," and Morgan subsequently filed internal union charges against Fisher over the incident.[13] The late October letter to the Union, complaining about Morgan, alleged that Morgan had "not been working satisfactorily with other members of the crew." The letter further advised that if Morgan's "attitude and performance on the job does not change, he will be fired."[14] This letter prompted a conference telephone call on or about November 3 and which included Morgan, Fisher, Union Business Agent Lemmons, Project Manager Morrall, and General Superintendent Lunsman.[15] During this conference call the conflicts between Fisher and Morgan were discussed, including Fisher's threat (which he admitted). The end result was that Fisher and Morgan had made their "peace" and Morgan would remain. The animosity between the two continued however, and during the second week of December Fisher proclaimed in front of employees Hefley and Pierce that he wanted to get rid of Morgan because he was a troublemaker.

4. The events of December 16 and 19

On Friday, December 16, a jurisdictional dispute occurred between the charging union (sprinkler fitters) and another union (operating engineers). This dispute was brought to bear by Morgan who had observed an operating engineer operating a forklift to help a sprinkler fitter set a large valve. The setting of these valves was work acknowledged to be performed solely by sprinkler fitters. Morgan pointed this out to both employees (the operating engineer and employee Pierce) and they both agreed, the engineer withdrawing from the operation. When Fisher saw what Morgan had done, he became upset and mad and told Morgan he was stirring up trouble again. Fisher then went to the office in front of employee Hefley, day-shift Foreman Lemons, Project Manager Morrall, and Job Superintendent Boyance, Fisher again proclaimed that Morgan was a troublemaker and that he planned to get rid of him one way or another. Boyance then told Fisher just to go and discharge Morgan, relating that General Superintendent Lunsman had said it would be alright. Fisher refused at this time stating that his union card was in jeopardy.[16] Later that day, Fisher related to Foreman Lemons that Morgan was going to be discharged and that he was glad to get rid of him.

On Monday, December 19, Job Superintendent Boyance and Fisher again discussed Morgan, Boyance indicating that they found a way of getting rid of Morgan by discharging him for absenteeism.[17] At the end of the day Morgan was discharged.

C. *Concluding Analysis*

I am convinced by the record and evidence in this case that Morgan's absence record was not excessive and that absenteeism was a pretext for Morgan's discharge.[18] The true cause for Morgan's discharge I find lies in the inability of Fisher and Morgan to work together with a minimum of friction and disruption. They disliked each other intensely and both played a part, whether properly

[10] Morgan's termination notice recites that he was discharged for excessive absenteeism, and the Respondent, in its brief, argues that "Plain and simple, Morgan was discharged because he was going to take another 2 weeks off."

[11] Morgan's final complaint was on Friday, December 16, and involved a work jurisdictional dispute. This will be discussed later in this Decision.

[12] For unknown reasons, Fisher did not testify in this case. He failed to respond to the General Counsel's original summons because of late service, but he was available and present upon resumption of the case in January 1979.

[13] Fisher was also a union member. The Union disputes board, long after Morgan's discharge, ultimately reprimanded both Fisher and Morgan over the incident.

[14] There is no credible evidence in the case that Morgan failed to perform his regular work duties with other crew members in other than an acceptable manner.

[15] Morgan places the Fisher-threat incident earlier the same day of the call. The incident definitely occurred prior to the conference call and may also have been to some extent a contributing factor prompting the conference call.

[16] Morgan's internal union charge against Fisher was pending at this time.

[17] The record is unclear as to whether their conversation took place before or after Morgan had indicated that he was going to take 2 weeks' leave.

[18] The Respondent's position that Morgan's declaration on Monday, December 19, that he was taking 2 weeks off contributed to or caused the discharge is, I think, unsound. Not only does it place the cart before the horse, in my opinion Morgan's demise became a certainty the previous week.

or otherwise, in contributing to what became an intolerable situation. Morgan was an outsider and was on unfirm ground from the beginning. After his immediate reinstatement in August, he gained a quick assertiveness, feeling some isolation to any serious repercussions from performing his job as steward by taking constant, full, and complete advantage of his position falling just short of unreasonableness. Fisher, on the other hand, had somewhat of a temper, and Morgan's presence and methodology as steward constantly agitated him. The incompatability of Morgan and Fisher and resulting disruption, standing alone, would legally justify the discharge of one or the other. However, the interjection of Morgan's firm and zealous performance as steward I find was the major contributing factor to this mutual antagonism. Fisher's "head in the mud" threat, and Morgan's union complaint over the incident were byproducts of the situation. Under the situation and circumstances, I find that although Morgan pushed at the upper limits of his duties and responsibilities as steward, he remained in bounds. Thus in this case Morgan had the technically legal advantage and Fisher, as foreman and a supervisor, had the prideless and distasteful responsibility of biting the bullet, which he could not do. There is little room for sympathy towards either. Both had jobs and duties to perform. Fisher often viewed Morgan's somewhat frequent complaints as petty or nitpicking and an impediment to moving the job along. With this expressed attitude, Morgan became more determined in the pursuit of complaints with increasing ardor. The two became on a collision course. Because the situation became virtually unsolvable without some action, one does have some sympathy in the dilemma of the Respondent's upper management in the situation. However, Morgan's actions as steward did promote legitimate union objectives. His duties as steward, although performed in a pertinacious manner, were nonetheless performed in furtherance of those objectives, directly resulting in his discharge. Morgan's actions as steward, I thus find, were the motivating factors in his discharge, and accordingly I find and conclude that Morgan's discharge violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.[19]

Upon the foregoing findings of fact and initial conclusions and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On December 19, 1977, the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Jimmy C. Morgan because of his protected concerted activities in performing his duties as a union steward.

4. The unlawful action and conduct concluded in paragraph 3, above, and found herein, affected commerce within the meaning of Section 2(6) and (7) of the Act.

5. Other than the misconduct concluded in paragraph 3, above, the Respondent Employer has not otherwise violated the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom,[20] and that it take certain affirmative action, as set forth below, designed to effectuate the policies of the Act. I shall further recommend that the Respondent post an appropriate notice.[21]

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employee Jimmy C. Morgan, I shall recommend that Respondent offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

I shall further recommend that the Respondent make Morgan whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment of a sum of money equal to that which he normally would have earned from the date of discharge to the date of its offer of reinstatement, less net earnings, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[22]

It will also be recommended that the Respondent preserve and, upon request, make available to the Board upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay under the terms of this recommended Order.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[19] Perhaps cooler heads should have prevailed. The best solution to anger may well have been further delay and negotiation in this case, placing the dilemma once again on the table. Or perhaps the Company should have more strongly encouraged Fisher to restrain from demonstrably expressing his feelings and opinions about Fisher and his actions. Likewise, perhaps Morgan should have used more diplomacy. I do not profess to know what the proper actions and solution should have been in the situation. I am thankfully relieved from the responsibility of determining the same. My determinations herein are confined only to the motivating factors in and for the discharge, and the legality of this motivation in light of protected union and employee activity under the Act.

[20] I shall also recommend that the additional "cease-and-desist" provisions of the Order be of the narrow variety, which I feel to be more appropriate in this case. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[21] It is likely that the General Motors plant has been completed. Should this be the case, I will recommend in the alternative that the Respondent be required to mail notices to employee Jimmy C. Morgan and all other employees on the Respondent's payroll at the General Motors jobsite in Oklahoma City, Oklahoma, as of December 19, 1977.

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[23]

The Respondent, Grunau Company, Inc., Oklahoma City, Oklahoma its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees who are union stewards for engaging in concerted activity for the mutual aid or protection of employees by making safety complaints or otherwise making complaint or requests to insure compliance with existing union contracts.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Jimmy C. Morgan immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of his unlawful discharge, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due herein.

(c) Post at the General Motors jobsite in Oklahoma City, Oklahoma, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms to be provided by the Regional Director for Region 16, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.[25]

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board "shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[25] In the event that the General Motors plant in Oklahoma City, Oklahoma, is completed, or the Respondent's work thereon is completed, copies of said notice shall, in the alternative, be mailed by the Respondent to employee Jimmy C. Morgan and all other employees who were on the Respondent's payroll at the said General Motors jobsite as of December 19, 1977.